



P/4976-19

THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Patent Application of

Marie-Pascale LATORSE et al.

Date: March 18, 2010

Serial No.: 10/553,363

Group Art Unit: 1616

Filed: October 14, 2005

Examiner: Pryor, A. N.

For: **FUNGICIDAL COMPOSITIONS COMPRISING A
PYRIDYLMETHYLBENZAMIDE DERIVATIVE AND CHLOROTHALONIL**

Mail Stop Appeal Brief – Patents
Commissioner of Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

APPEAL BRIEF

Sir:

The Appellants submit this Appeal Brief pursuant to 37 C.F.R. § 41.37(d). The Notice of Appeal was filed and the fee paid on January 25, 2010. Please charge the \$540 Appeal Brief fee to Deposit Account No. 15-0700.

CONTINGENT EXTENSION REQUEST

If this communication is filed after the shortened statutory time period has elapsed and no separate Petition is enclosed, the Director of Patents and Trademarks is petitioned, under 37 C.F.R. § 1.136(a), to extend the time for filing the Appeal Brief by the number of months which will avoid abandonment under 37 C.F.R. § 1.135. The fee under 37 C.F.R. § 1.17 should be charged to Deposit Account No. 15-0700.

The Appellants rely upon the following authorities and arguments to maintain the appeal.



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1. Real Party in Interest

The real party in interest for this matter is BAYER CROPSCIENCE S.A. The assignee and real party in interest is BAYER CROPSCIENCE S.A. The Assignment is recorded on Reel 017857 at Frame 0311.

2. Related Appeals and Interferences

There are no other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

3. Status of Claims

Claims 1, 15-17, 21-23 are pending in the application, rejected, and appealed. Claims 2-14 and 18-20 have been canceled.

4. Status of Amendments

The final Office Action was mailed on August 24, 2009. A Response was filed on October 26, 2009. The pending claims remained as they had been previously. The Examiner, in an Advisory Action mailed on December 7, 2009, stated that the request for reconsideration had been considered, but did not place the application in condition for allowance. In his opinion, claims 1 and 15-17 are anticipated under 35 U.S.C. 102(e) by Foor et al. (WO 03/079788;

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10/2/03) and claims 21-23 are unpatentable under 35 U.S.C. 103(a) over Foor et al. The attached listing of claims reflects those listed in the Response filed on October 26, 2009.

5. Summary of Claimed Subject Matter

The present invention relates to a fungicidal composition comprising:

- a) a pyridylmethylbenzamide derivative which is 2, 6-dichloro-N-[3-chloro-5-(trifluoromethyl)-2- pyridinyl] methyl} benzamide also known as fluopicolide; and
- b) a chloronitrile derivative which is chlorothalonil; in a fluopicolide/chlorothalonil weight ratio of from 1:20 to 1:1.

Citations to pages and lines of the specification are to the application as published in Pub. No.: US 2006/0293369.

Independent Claim 1

Independent claim 1 recites a fungicidal composition comprising:

- a) a pyridylmethylbenzamide derivative which is 2, 6-dichloro-N-[3-chloro-5-(trifluoromethyl)-2- pyridinyl] methyl} benzamide also known as fluopicolide; and
- b) a chloronitrile derivative which is chlorothalonil; in a fluopicolide/chlorothalonil weight ratio of from 1:20 to 1:1.

Support for this embodiment is found in paragraphs [0006], [0014], [0015], [0037], [0038], [0097], [0098], [0100], [0101], [0102], [0105], and [0110].

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Dependent Claim 15

Dependent claim 15 depends on independent claim 1. Dependent claim 15 recites the composition of claim 1 further comprising a member selected from the group consisting of an agriculturally acceptable support, a carrier, a filler, and a surfactant.

Support for this embodiment is found in paragraphs [0046], [0047], and [0048].

Dependent Claim 16

Dependent claim 16 depends on independent claim 1. Dependent claim 16 recites a method for combating and controlling phytopathogenic fungi of crops comprising applying an effective and non-phytotoxic amount of a composition according to claim 1 to seed, plant and/or to fruit of the plant or to soil in which the plant is growing or in which it is desired to grow.

Support for this embodiment is found in paragraphs [0052] through [0057], inclusive.

Dependent Claim 17

Dependent claim 17 depends on dependent claim 16. Dependent claim 17 recites the method of claim 16 wherein the plant is selected from the group consisting of potato, vegetables, and lawn.

Support for this embodiment is found in paragraphs [0058], [0065], [0066], [0068], [0070], [0078], [0079], and [0085] through [0110].

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Dependent Claim 21

Dependent claim 21 depends on independent claim 1. Dependent claim 21 recites the fungicidal composition of claim 1 wherein the fluopicolide/chlorothalonil weight ratio is in the range of from 1/20 to 1/2, inclusive.

Support for this embodiment is found in paragraphs [0014], [0041], [0097], [0098], [0100], [0101], [0105], and [0110].

Dependent Claim 22

Dependent claim 22 depends on dependent claim 21. Dependent claim 22 recites a method for combating and controlling phytopathogenic fungi of crops comprising applying an effective and non-phytotoxic amount of a composition according to claim 21 to seed, plant and/or to fruit of the plant or to soil in which the plant is growing or in which it is desired to grow.

Support for this embodiment is found in paragraphs [0014], [0041], [0052] through [0057], [0097], [0098], [0100], [0101], [0105], and [0110].

Dependent Claim 23

Dependent claim 23 depends on dependent claim 22. Dependent claim 23 recites the method of claim 22 wherein the phytopathogenic fungus is *Phytophthora infestans*.

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Support for this embodiment is found in paragraphs [0066], [0075], and [0085] through [0110], inclusive.

6. Grounds of Rejection to Be Reviewed on Appeal

The remaining grounds of rejection are a rejection under 35 U.S.C. § 102(e) and a rejection under 35 U.S.C. § 103(a).

Rejection under 35 U.S.C. § 102(e)

The Examiner has rejected claims 1 and 15 through 17 under 35 U.S.C. § 102(e) as being anticipated by Foor et al. (WO 03/079788; 10/2/03).

Rejection under 35 U.S.C. § 103(a)

The Examiner has rejected claims 21 through 23 under 35 U.S.C. § 103(a) as being unpatentable over Foor et al. (WO 03/079788; 10/2/03).

7. Argument

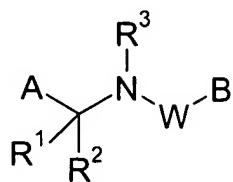
Foor et al. disclose compositions for controlling plant diseases caused by fungal plant pathogens comprising:

- (a) a fungicidally effective amount of a compound of Formula (I)

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(including all geometric and stereoisomers, N-oxides, and agriculturally suitable salts thereof)

wherein A, B, W, R¹, R², and R³ are as defined in the disclosure; and

- (b) at least one compound selected from the group consisting of
 - (b1) alkylenebis(dithiocarbamate) fungicides;
 - (b2) compounds acting at the *bc₁* complex of the fungal mitochondrial respiratory electron transfer site;
 - (b3) cymoxanil;
 - (b4) compounds acting at the demethylase enzyme of the sterol biosynthesis pathway;
 - (b5) morpholine and piperidine compounds that act on the sterol biosynthesis pathway;
 - (b6) phenylamide fungicides;
 - (b7) pyrimidinone fungicides;
 - (b8) phthalimides; and
 - (b9) fosetyl-aluminum.

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Also disclosed are methods for controlling plant diseases caused by fungal plant pathogens that involves applying an effective amount of the combinations described. Also disclosed are certain compounds of Formula (I).

Appellants acknowledge that the Foor et al. reference teaches the combination of 2,6-dichloro-N- {[3-chloro-5- (trifluoromethyl)-2-pyridinyl] methyl} benzamide and chlorothalonil. The present claims, however, are not simply directed to the combination of pyridylmethylbenzamide compounds and chlorothalonil, but, rather, to a combination of one of these fungicides: 2, 6-dichloro-N- {[3-chloro-5- (trifluoromethyl)-2- pyridinyl] methyl} benzamide - also known as fluopicolide - and chlorothalonil in relatively narrow, and specifically defined, ratios. There is no mention of these currently claimed ratios in Foor et al. It is submitted that nowhere in the reference is there any disclosure of the ratio of the weight of the 2,6-dichloro-N- {[3-chloro-5- (trifluoromethyl)-2-pyridinyl] methyl} benzamide to the weight of the chlorothalonil. The reference is replete with teachings of the ratios of compound (a), i.e. compounds of Formula I, which, *inter alia*, includes 2,6-dichloro-N- {[3-chloro-5-(trifluoromethyl)-2-pyridinyl] methyl} benzamide, to compound (b) (i.e., compounds b1 through b9), but *not one of compounds b1 through b9 includes chlorothalonil.*

Claims 1 and 15-17 all require that the weight ratio of fluopicolide/chlorothalonil be in the range of from 1:20 to 1:1. Thus, it is submitted that claims 1 and 15-17 are not anticipated by Foor et al.

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Further, it is submitted that the present invention is not obvious over Foor et al. It is, and has been, the Appellants' position that they have discovered a combination that clearly exhibits synergism and is neither disclosed nor suggested by the cited art. They have demonstrated this synergism for this combination in Examples 1 and 2 (see, in particular, Tables 3 and 4), using means for determining synergism that is accepted in the art, i.e., the Colby formula, which was published in the journal Weeds, 1967, 15, pp. 20-22. (See, for example, U.S. Patent No. 6,753,339 in which the Colby method of determining synergism was also employed to the satisfaction of the Patent Office.) Based on the teachings of the cited reference, a skilled artisan would have indeed expected fungicide activity for mixtures of 2, 6-dichloro-N-[3-chloro-5-(trifluoromethyl)-2- pyridinyl] methyl} benzamide and chlorothalonil, but would not have expected any synergy when associating these compounds in the claimed weight ratios, as evidenced by the examples of the present application. Unexpected results have thus been shown for the claimed combination and it logically follows from this that the combination cannot be obvious.

Appellants have discovered a novel and unobvious combination of fungicides that exhibits a synergistic effect that allows a reduction of the chemical substances spread into the environment and a reduction of the cost of the fungal treatment. Thus, the combination of the present invention enables a reduction in the doses of chemical products spread in the environment in order to control fungal attacks of crops, especially potatoes, vegetables, and lawns, in particular by reducing the doses of the products for application, and increases the

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number of antifungal products available to farmers for them to find among them the fungicidal agent best suited to their particular use.

Conclusion

The Examiner's cited references fail to disclose or make obvious the composition and method claimed by the Appellants. This rejection should be reversed.

Favorable consideration of the application is respectfully requested.

8. Claims Appendix

An appendix is attached that contains a copy of the claims, as amended, that are involved in this appeal.

9. Evidence Appendix

The Appellants do not rely on additional evidence in this appeal.

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10. Related Proceedings Appendix

The Appellants are unaware of any related proceedings.

Respectfully submitted,



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Claims Appendix

Listing of Claims:

1. A fungicidal composition comprising:
 - a) a pyridylmethylbenzamide derivative which is 2, 6-dichloro-N-{{[3-chloro-5-(trifluoromethyl)-2- pyridinyl] methyl} benzamide also known as fluopicolide; and
 - b) a chloronitrile derivative which is chlorothalonil; in a fluopicolide/chlorothalonil weight ratio of from 1:20 to 1:1.

2 - 14 (Canceled)

15. The composition of claim 1 further comprising a member selected from the group consisting of an agriculturally acceptable support, a carrier, a filler, and a surfactant.
16. A method for combating and controlling phytopathogenic fungi of crops comprising applying an effective and non-phytotoxic amount of a composition according to claim 1 to seed, plant and/or to fruit of the plant or to soil in which the plant is growing or in which it is desired to grow.

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17. The method of claim 16 wherein the plant is selected from the group consisting of potato, vegetables, and lawn.

18 - 20 (Canceled)

21. The fungicidal composition of claim 1 wherein the fluopicolide/chlorothalonil weight ratio is in the range of from 1/20 to 1/2, inclusive.

22. A method for combating and controlling phytopathogenic fungi of crops comprising applying an effective and non-phytotoxic amount of a composition according to claim 21 to seed, plant and/or to fruit of the plant or to soil in which the plant is growing or in which it is desired to grow.

23. The method of claim 22 wherein the phytopathogenic fungus is *Phytophthora infestans*.

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Evidence Appendix

The Appellants do not submit any further evidence pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132.

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Related Proceedings Appendix

No decisions rendered by a court or the Board in any proceeding identified pursuant to 37 C.F.R. § 41.38(c)(1)(ii) are known to the Appellants.